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**IN THE
COURT OF APPEALS OF INDIANA**

TIRON D. CORTHEM,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A04-0606-CR-312

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0205-FA-11

March 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Tiron Corthen appeals the revocation of his probation. On appeal, Corthen raises two issues, which we restate as follows. Whether the trial court properly held a probation revocation hearing before Corthen's criminal proceedings relating to the probation violation were concluded; and whether Corthen was afforded his due process right to confront his accusers at the probation revocation hearing. Concluding that the trial court properly held the hearing and that Corthen was afforded due process, we affirm.

Facts and Procedural History

On February 20, 2003, Corthen pled guilty to dealing cocaine, a Class B felony. He was sentenced to a six-year term of incarceration, with two years suspended and two years of probation following his release. One of the terms of Corthen's probation was that he not further violate the law.

On February 24, 2006, the probation department filed an amended petition in the trial court alleging that Corthen had violated his probation. A denial was entered on Corthen's behalf and an evidentiary hearing was held on May 25, 2006. At this hearing, evidence was presented to the trial court that on January 19, 2006, while on probation, Corthen possessed cocaine and marijuana and sold cocaine to a police informant. A police officer who witnessed the cocaine sale via hidden camera testified as to what he saw as well as to the actions of some other officers. He testified that according to his training, he believed the

substances found on Corthen were marijuana and cocaine.¹ He also testified that Corthen told him after the arrest that he sold cocaine to the informant and had also sold narcotics to other individuals. Corthen objected to the officer's testimony regarding the actions of other police officers and to his testimony regarding the nature of the substances found on Corthen. The trial court overruled these objections.

Corthen entered a motion to continue the evidentiary hearing pending the outcome of the trial on the underlying charges. The trial court denied this motion and found that Corthen had violated the terms of his probation. Corthen then asked that the trial court's decision be deferred until the trial on the underlying charges was held. The trial court also denied this request. At the disposition hearing on June 1, 2006, the trial court ordered that Corthen execute the remainder of his original six-year sentence. Corthen now appeals.

Discussion and Decision

I. Holding the Probation Revocation Hearing before the Criminal Trial

Under Indiana statute, after a petition to revoke probation is filed, the court must conduct a hearing on the matter with evidence taken in open court, where the State must prove the violation by a preponderance of the evidence. Ind. Code § 35-38-2-3 (d), (e). Because this burden of proof is lower than in a criminal trial, a revocation of probation can be proper even if a defendant has been acquitted of the criminal charge. Thornton v. State, 792 N.E.2d 94, 99 (Ind. Ct. App. 2003). Also, “[i]t is not necessary that a criminal conviction precede revocation of probation for unlawful conduct; it is only necessary that the

¹ From the officer's testimony, it is not clear whether he field-tested the drugs himself, or merely saw

trial judge, after a hearing, finds such unlawful conduct to have occurred.’” Jackson v. State, 420 N.E.2d 1239, 1240 (Ind. Ct. App. 1981) (quoting Hoffa v. State, 267 Ind. 133, 135, 368 N.E.2d 250, 252 (1977)).

Corthen recognizes that according to current case law, a probation revocation hearing can be held before a trial for the underlying charges. He asks us to overrule these decisions. Our supreme court decided this matter, however, in Hoffa, when it held that a criminal conviction was not a prerequisite for probation revocation where the trial court was presented with sufficient evidence that a violation of the terms of probation occurred. Hoffa, 267 Ind. at 135, 368 N.E.2d at 252. “It is well settled that ‘[w]e are bound by the decisions of our supreme court.’” Moore v. State, 839 N.E.2d 178, 185 n.4 (Ind. Ct. App. 2005), trans. denied (quoting Dragon v. State, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002), trans. denied). We therefore hold that the trial court properly revoked Corthen’s probation before the conclusion of his criminal trial for the offenses on which revocation was based.

II. Corthen’s Due Process Right to Confront his Accusers

A person alleged to have violated the terms of his probation has a right, at the probation revocation hearing, to confrontation, cross-examination, and representation by counsel. Ind. Code § 35-38-2-3(e). Rules of evidence, other than those with respect to privileges, do not apply to proceedings relating to probation. Ind. Evidence Rule 101(c)(2). In probation revocation hearings, judges may hear and “consider any relevant evidence bearing some substantial indicia of reliability.” Cox. v. State, 706 N.E.2d 547, 551 (Ind.

the substances.

1999).

In C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004), a defendant argued that his right to confront witnesses against him was violated when his probation officer testified about a failed drug test at a dispositional hearing. Although some of the probation officer's testimony amounted to hearsay, hearsay evidence is admissible in this type of proceeding and the defendant was afforded an opportunity to cross-examine the probation officer regarding the hearsay. We stated, "[h]e confronted the probation officer and skillfully cross examined her concerning her knowledge and lack of knowledge about the test. That is what due process requires under these circumstances since the hearsay nature of the testimony was not objectionable." Id. at 1281.

Similarly, in the present case, Corthen was afforded the opportunity to confront and cross-examine the officer who witnessed Corthen sell cocaine to a police informant. Corthen's argument that this officer's testimony violated his due process rights fails, because Corthen was able to confront and cross-examine the witness offering the testimony.

Even without considering the officer's hearsay statements to which Corthen objects, the trial court could have properly found that the State met its burden of proof based on the officer's testimony concerning events that he did personally witness. The officer testified that Corthen admitted to him that he sold cocaine. This statement by a party opponent is not hearsay. Ind. Evidence Rule 801(d)(2). "When reviewing a trial court's determination that the appellant has violated the terms of his probation, we may neither reweigh the evidence nor reassess the credibility of the witnesses." Thornton, 792 N.E.2d at 96. Without

reweighing the officer's testimony or reassessing his credibility, his testimony regarding Corthen's statements supports the trial court's determination to revoke Corthen's probation. Therefore, even if the trial court erroneously admitted hearsay, any error was harmless.

Conclusion

We hold that the trial court acted properly in holding an evidentiary hearing to determine whether Corthen's terms of probation had been violated, even though the related criminal trial had not yet taken place. Corthen was also afforded due process, as the trial court gave Corthen an opportunity to confront his accusers. The judgment of the trial court is therefore affirmed.

Affirmed.

BAKER, J., and DARDEN, J., concur.